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Before the
Federal Communications Commission
Washington, DC 20054

In the Matter of	)	
	)	
Standardized and Enhanced	)	MM Docket No. 00-168
Disclosure Requirements for	)	
Television Broadcast Licensee	)	
Public Interest Obligations	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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Executive Summary

The National Association of Broadcasters ("NAB") submits these comments in response to the *Notice of Proposed Rulemaking* seeking comment on various proposals to standardize and enhance public interest disclosure requirements for television broadcasters. NAB urges the Commission to refrain from adopting its proposals, which are reminiscent of those discarded in the 1980's, serve no clearly defined regulatory purpose, raise constitutional questions, and would impose significant burdens on broadcasters.

As an initial matter, NAB questions the basic approach taken by the Commission in this proceeding. With its emphasis on the collection and reporting of information in particularized formats and by specific means, the *Notice* appears to regard information gathering and record keeping as independently significant goals that need not directly serve regulatory purposes relevant in the current competitive media marketplace.

NAB also has reservations about the Commission's specific proposals to create a new standardized "public interest" disclosure form inquiring about, *inter alia*, (1) broadcasters' airing of certain defined categories of television programming, and (2) the actions taken by broadcasters to ascertain their communities' programming needs and interests. The adoption of a standardized form requiring broadcasters to identify the programming aired in specific government-defined categories would raise deep First Amendment concerns. Moreover, as a practical matter, the Commission's proposals would likely result in the greater homogenization of television programming, as broadcasters respond to the Commission's expressed programming preferences. In addition, NAB questions the evidentiary basis and policy rationale on which the

Commission seeks to resurrect in another form its ascertainment requirements, which were eliminated in 1984 because the Commission had no evidence that they positively influenced the programming performance of television stations. For these reasons, NAB believes the Commission should refrain from adopting its proposed standardized form, and should instead retain its long-standing policies about the programming-related disclosures of broadcasters.

Finally, NAB disagrees with the Commission's contention that its proposal to require television stations to convert their entire public inspection files into electronic format and place them on Internet websites would not be unduly burdensome. Our research indicates that the Commission's proposal would entail significant burdens, particularly on stations that do not currently have websites and on stations with limited personnel resources. The costs and burdens imposed on broadcasters would, moreover, increase greatly depending on whether the Commission requires websites with public files to possess specific "user friendly" features or technical capabilities. Especially in comparison to the costs and technical uncertainties of the proposal, the benefits to be derived from placing public files on the Internet appear less than the Commission assumed. For these reasons, NAB urges the Commission to refrain from adopting this proposal, or at the very least consider less problematic alternatives.

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TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] The *Notice* sought comment on proposals to standardize and enhance public interest disclosure requirements for television broadcasters. Specifically, the *Notice* proposed to require television station licensees to use a standardized form -- which would include questions about categories of programming -- to provide information on how their stations serve the public interest. The Commission requested additional comment on whether television licensees should provide narrative descriptions on this new standardized form of the actions taken to assess their communities' programming needs and interests. The Commission also proposed in the *Notice* to require

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[1] NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

[2] *Notice of Proposed Rulemaking* in MM Docket No. 00-168, FCC 00-345 (rel. Oct. 5, 2000) ("*Notice*").

licensees to make the contents of their public inspection files (including the new form) available on their stations' or a state broadcasters association's Internet website.

As an initial matter, NAB questions the basic approach taken by the Commission in this proceeding. With its emphasis on the collection and reporting of information in particularized formats and by specific means, the *Notice* appears to regard information gathering and record keeping as independently significant goals that need not directly serve regulatory purposes relevant in the current competitive media marketplace.

NAB also has reservations about the Commission's specific proposals to create a new standardized form inquiring about, *inter alia*, (1) broadcasters' airing of certain defined categories of television programming, and (2) the actions taken by broadcasters to ascertain their communities' programming needs and interests.[3] The adoption of a standardized form requiring broadcasters to identify the programming aired in particular government-defined categories would raise deep First Amendment concerns by involving the Commission in content-based regulation, and would, as a practical matter, likely result in the greater homogenization of television programming, as broadcasters respond to the Commission's expressed programming preferences. In addition, NAB questions the evidentiary basis and policy rationale on which the Commission seeks to resurrect in another form its ascertainment requirements, which were eliminated in 1984.

Finally, NAB disagrees with the Commission's assertion that converting a television station's entire public inspection file into an electronic format and placing it on a website would

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[3] The *Notice* tentatively concluded that each licensee must place a copy of this proposed standardized disclosure form in its public inspection file and retain the forms until final action on its next renewal application. This standardized form would replace the issues/programs lists that television broadcasters are currently required to maintain in their public files.

not be unduly burdensome. The *Notice* contained no evidence for this assertion, and the Commission clearly did not consider the costs and personnel burdens, as well as the practical difficulties and relatively limited benefits, of maintaining public inspection files on the Internet. Given also its failure to address any questions relating to the technical characteristics of Internet public files, the Commission should refrain from adopting its proposal, or should at the least consider less problematic alternatives.

I. The Commission's Approach In This Proceeding Reflects An Outmoded Regulatory Mindset And Treats Information Collection And Reporting As Independently Significant Regulatory Goals.

Following the vast increases in the number of television and radio stations in the 1960's and 1970's, the Commission in the 1980's eliminated much of its detailed programming-related broadcasting rules (including ascertainment and numerical guidelines for non-entertainment programming).[4] The Commission significantly deregulated the broadcast industry because it believed that the programming services offered to the public would not be adversely affected -- or could even improve -- in the absence of regulation due to increasingly competitive marketplace conditions.[5] The *Notice* presented no evidence that the Commission erred in

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[4] *See, e.g., Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981) ("*Radio Deregulation Order*"); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ("*Television Deregulation Order*").

[5] *See, e.g., Radio Deregulation Order* at 1022-23 (the Commission's primary public interest objective is to foster programming "responsive to the wants and needs of the public," and "given the status of radio broadcasting today, the marketplace and competitive forces are more likely to attain these public interest objectives than are regulatory guidelines and procedures"); *Television Deregulation Order* at 1077 ("market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities"; "deregulation . . . reflects the importance and viability of market incentives as a means of achieving our regulatory objectives

reaching these conclusions in its earlier proceedings, and consequently the Commission lacks a proper basis upon which to adopt the "reregulatory" initiatives contained in the *Notice*.

Indeed, given the explosion of both broadcast and non-broadcast media in recent years (including various multichannel video programming providers and the Internet), NAB posits there is less need than ever for the Commission to return to the regulatory approaches of the past. In particular, the transition to digital television broadcasting – with its potential for increasing programming and other service options – would appear to justify a further *decrease* in Commission regulation, rather than a reinstatement of intrusive regulatory policies. The Commission has in fact previously recognized that, as the media marketplace becomes more competitive in the future, market incentives would be even more clearly sufficient to insure the provision of responsive programming, and the need for regulation would continue to decline.[6]

Not only has the Commission failed to provide evidence that its deregulatory initiatives of the 1980's should be reversed because they adversely affected television programming services, the *Notice* presented no evidence indicating that the proposed regulations would actually improve the programming services offered to the public. As described above, the *Notice* proposed requirements for the collection and reporting of certain information in particularized formats (*e.g.*, a new standardized form) and by specific means (*e.g.*, posting on Internet website).

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and will provide television broadcasters with increased freedom and flexibility in meeting the continuously changing needs of their communities").

[6] *See Television Deregulation Order* at 1086, 1099 (emergence of "new technologies, coupled with the continued growth in the number of television stations, will create an economic environment that is even more competitive than the existing marketplace," will "only further ensure the presentation" of informational/non-entertainment programming, and "will continue" to cause a "decline" in the "need" for regulation, such as ascertainment); FCC, *Report Card on Implementation of the Chairman's Draft Strategic Plan* at 1 (March 2000) (in five years, the communications markets will "be characterized predominantly by vigorous competition that will greatly reduce the need for direct regulation").

But information gathering and reporting do not constitute independently significant regulatory goals, but should at most be regarded as a means to an end. And the Commission has failed to establish that these means will serve an important regulatory end that is relevant in today's highly competitive media marketplace. Certainly the Commission has not shown that its information collection and reporting proposals will promote, in a direct and cost-effective manner, the provision of television programming that is more varied or responsive than the vast array of programming currently offered in the marketplace.[7]

It is axiomatic that any Commission regulation must be supported by an adequate factual basis.[8] In particular, the Commission must in this proceeding supply a detailed and reasoned analysis to justify its change in course away from the deregulatory approach adopted in the early 1980's.[9] Given the lack of evidence demonstrating that marketplace incentives currently fail to produce video programming responsive to consumers *and* that the Commission's information collection/reporting proposals would address this market failure, the Commission has no sound

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[7] The Commission at times even appeared hesitant to assert any connection between its proposals and the offering of programming by broadcasters. For example, rather than explaining how the Commission's proposals would produce more varied, diverse or otherwise improved programming, the *Notice* instead contended that these proposals would merely "promote discussion between the licensee and its community" and "increase a broadcaster's ability to interact with its local community." *Notice* at ¶¶ 1, 3. Indeed, even when attempting to draw a connection between its proposals and the programming obligations of stations, the Commission was reduced to citing other notices of proposed rulemaking as "evidence." *See Notice* at ¶ 10 and n. 26.

[8] *See, e.g., Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (rules restricting cellular providers from participating in certain spectrum auctions were found arbitrary because Commission offered no economic rationale or other factual support for them).

[9] *See, e.g., Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) (an agency changing course "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852

basis for adopting its proposals.[10] Certainly the Commission has implicitly recognized that it cannot justify the proposals contained in the *Notice* based merely on the current transition of television broadcasters from analog to digital broadcasting.[11] Absent this or any other basis for the proposed "reregulatory" initiatives, NAB urges the Commission to refrain from adopting regulatory policies reminiscent of those discarded years ago as unlikely to "positively influenc[e] the programming performance of stations." *Television Deregulation Order* at 1098.

II. Adoption Of The Proposed Standardized Disclosure Form Raises A Number Of Constitutional, Policy And Practical Questions.

A. The Governmental Definition of Preferred Categories of Programming Implicates Constitutional Concerns.

The Commission has proposed that its new standardized disclosure form ask questions about selected categories of programming, including the title of programs aired in each category and the time, date and duration of the programs. *See Notice* at ¶¶ 18-19. NAB believes that the Commission's inquiry into the amount of programming aired by broadcasters in certain government-defined categories raises serious constitutional questions.

(D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed").

[10] *See, e.g., ALLTEL Corp. v. FCC*, 838 F.2d 551, 560 (D.C. Cir. 1988) (FCC's "facially plausible" claim that its rule on the costs of local exchange carriers prevented certain abuses ultimately failed to justify the rule because there was "no showing that such abuse" did in fact exist and "no showing that the rule target[ed] companies engaged in such abuse"); *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (court found broadcast integration policy to be arbitrary and capricious, because Commission had "no evidence to indicate" that the policy achieved "even one of the benefits that the Commission attribute[d] to it").

[11] *See Notice* at ¶¶ 4, 11 (the "mechanisms proposed" in the *Notice* "do not relate exclusively to digital transmissions," and the Commission tentatively concluded it "should not limit application" of the requirements to digital television). *See also* Separate Statements of Commissioners Powell and Furchtgott-Roth (both Commissioners noted that the *Notice* seeks comment on proposals that have no nexus with the transition to digital, and they questioned why the transition provides a basis for justifying new public interest obligations).

As Commissioners Powell and Furchtgott-Roth explained in their statements on the *Notice*, selecting certain types of programs over others and requiring broadcasters to list the programming aired in those preferred categories necessarily involves the Commission in content regulation. By creating program categories in this manner, the Commission will inevitably make subjective value judgments as to which types of programs serve the public interest and, by implication, which types of programs do not. For example, the sample form created by the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters ("Advisory Committee"), and expressly referenced in the *Notice*, includes no category for religious programming. A significant proportion of the viewing public may, however, think that religious programming serves the public interest to an equal, if not greater, degree than the types of programming (such as public affairs) deemed to serve the public interest by the Advisory Committee and chosen for inclusion on its form.[12] The inherently subjective nature of choosing programming for inclusion on a standardized form based on the substance of that program seems to violate the Supreme Court's admonition that the Commission may not, consistent with the First Amendment, "impose" upon licensees "its private notions of what the public ought to hear."[13]

The absence of a requirement that broadcasters provide set amounts of programming in each selected category does not, moreover, remove the constitutional problems associated with the Commission's proposals. Even though the proposed regulations would not establish a hard-

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[12] Religious broadcasters have in fact previously opposed on First Amendment grounds Commission proposals to adopt quantitative program guidelines for television licensees because such proposals would disfavor the types of programs for which guidelines were not set. *See Report and Order* in Docket No. 19154, 66 FCC 2d 419, 426 (1997).

[13] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) (*quoting* FCC, *Network Programming Inquiry, Report and Statement of Policy*, 44 FCC 2303, 2308 (1960)).

and-fast quota for each program category,[14] their adoption would certainly indicate that the Commission prefers the categories of programming defined on the standardized form, and wants to know whether (and how much of) such kinds of programming broadcasters air. At the very least, the proposals would create significant governmental pressure on broadcasters (1) to offer programming with content fitting the Commission's favored categories, and (2) to reduce, by necessity, the amount of broadcast time available for other, less favored programming content. Indeed, the instant proposals, if adopted, would almost inevitably produce *de facto* programming quotas, as broadcasters would feel compelled to air at least some amounts of programming in each category selected by the Commission for inclusion on the standardized form.[15] In sum, the clearly coercive effect of government-selected program categories on television broadcasters raises obvious First Amendment difficulties.[16]

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[14] The Supreme Court has clearly indicated constitutional problems with that approach. *See, e.g., Turner Broadcasting*, 512 U.S. at 650 ("FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations").

[15] A broadcaster's decision not to offer programming in any one of the Commission's preferred categories would, for example, be questioned during renewals and station transfers. A broadcaster would clearly raise the risk of facing complaints and petitions to deny if it failed to provide "sufficient" programming in any of the "public interest" categories defined by the Commission, regardless of the overall merit of the programming service offered by the broadcaster, the lack of demand for programming in a particular category in the broadcaster's community, or the total amount of programming offered in each category across the market as a whole.

[16] *See, e.g., Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (any "content-based definition" of "diverse programming" gives "rise to enormous tensions with the First Amendment"); *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983) (Congress "has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities," and any "Commission requirement mandating particular program categories would raise very serious First Amendment questions").

Given the constitutional implications of defining preferred categories of programming and requiring broadcasters to report the amounts of programming aired in those categories, NAB urges the Commission to reconsider its proposal to create a new standardized form. The Commission's existing approach, which defers to broadcasters' methods of describing the programming they air to cover issues facing their communities, should instead be retained.[17] Unlike the instant proposals, this long-standing approach respects the constitutionally-recognized editorial independence of broadcasters while still insuring that they carry programs addressing issues of concern to their communities.[18]

B. The Creation of a Standardized Form with Favored Program Categories Raises a Number of Practical Problems and Is Unwise as a Matter of Policy.

Even apart from the constitutional implications of the Commission defining preferred categories of programming, the creation of a standardized form seems unwise as a matter of policy, and may also raise practical difficulties in the selection and defining of the program

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[17] Under current rules, television licensees must provide coverage of issues facing their communities and place lists of programming used in providing significant treatment of those issues (issues/programs lists) in their stations' public inspection files. *See Notice* at ¶ 6; 47 C.F.R. § 73.3526(e)(11).

[18] Courts have repeatedly recognized the wide editorial discretion afforded to broadcasters under the Constitution and the Communications Act. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties," and "we must necessarily rely in large part upon the editorial initiative and judgment" of broadcasters); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973) ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations"); *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (court rejected petitioners' call for the adoption of quantitative programming standards in the renewal context, concluding that this approach "would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission").

categories. For these additional reasons, the Commission should not replace its existing approach (*i.e.*, issues/programs list) with a new standardized form.

1. The Commission's Proposals Would Likely Result in the Greater Homogenization of Television Programming.

As NAB explained above, and as noted by Commissioners Powell and Furchtgott-Roth in their statements, the adoption of FCC-selected program categories would pressure broadcasters into airing content fitting into those favored categories. A standardized form with program categories would therefore tend to produce more standardized and less varied programming, as broadcasters give primary attention to the preferred categories and reduce broadcast time for other, less favored types of programs. Indeed, the Commission has previously recognized that program standards or guidelines cause licensees to become primarily responsive to the guidelines, rather than to their local markets, and has rejected proposed, or eliminated existing, program guidelines on this very basis.[19]

Because "[u]niversally applied rules or guidelines cannot take into account differences among communities" and are often "unresponsive to the wants or needs of the public in individual markets," *Radio Deregulation Order* at 1023, the Commission should not adopt a

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[19] *See, e.g., Report and Order* in Docket No. 19154, 66 FCC 2d 419, 428-29 (1977) (in declining to adopt quantitative program standards for television broadcasters involved in comparative renewal proceedings, the Commission stated that the government should not "impose on broadcasters a national standard of performance in place of independent programming decisions attuned to the particular needs of the communities served"); *Radio Deregulation Order* at 1059 (Commission decided to eliminate guidelines for radio non-entertainment programming, because "guidelines that pertain to all licensees create incentives for all licensees to act the same way, even if they are operating in very different market environments. Licensees become responsive first and foremost to the guideline, only secondarily to the public. Hence guidelines may not provide programming in the public interest."); *Television Deregulation Order* at 1087-88 (Commission eliminated television non-entertainment programming guidelines to give licensees the "flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand").

standardized form with program categories for television broadcasters. It would be ironic indeed if the Commission's attempt to improve broadcasters' service to the public ultimately hindered, through the imposition of standardized "public interest" program categories, broadcasters' ability to respond to the "wants or needs of the public" in their "individual markets." And it is, after all, the interests of members of the public that are intended to be paramount under the broadcast *public* interest standard – not the interests of any government regulatory agency or even the interests of any "public interest" advocacy group.[20]

NAB accordingly urges the Commission to reject its proposed standardized approach and retain its current approach, which was adopted in 1984 to "provide television broadcasters with increased freedom and flexibility in meeting the continuously changing needs of their communities." *Television Deregulation Order* at 1077. The *Notice* contained no evidence indicating that, during the past 16 years, broadcasters have neglected to meet the "changing needs of their communities." There is also no evidence suggesting that viewers are unable to access a sufficiently wide variety of video programming from an ever-increasing number of broadcasters, as well as other providers in the market.[21] Above all, the Commission has offered

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[20] *See, e.g., Turner Broadcasting*, 512 U.S. at 650 (FCC may not impose upon broadcasters "its private notions of what the public ought to hear"); Fowler and Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 209-210 (1982) ("Communications policy should . . . maximiz[e] the service the public desires. Instead of defining public demand and specifying categories of programming to serve this demand, the Commission should rely on the broadcasters' ability to determine the wants of their audience through the normal mechanisms of the marketplace. The public's interest, then, defines the public interest."); T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 315 (1994) ("There has been a persistent demand from critics [of broadcasting] for more and better public affairs programming . . . . Behind this, however, is the belief that it is the right of elites to dictate tastes to viewers and listeners that is really paramount.").

[21] In 1964, for example, the "video marketplace consisted solely of 649 television stations and a small number of cable systems whose primary purpose was to retransmit the signals of over-the-air broadcast stations." *Notice of Proposed Rulemaking* in MM Docket No. 91-221, 7 FCC Rcd 4111, 4114 (1992). Today there are 1663 full service television stations, 2379 low power and

no evidence demonstrating that, as broadcasters move into an era of digital abundance, the adoption of standardized program categories would promote the provision of programming more diverse, varied or responsive to the local community than that produced by marketplace incentives.[22]

In fact, the only alleged defect in the Commission's current requirements is that the issues/programs lists provide too large an assortment of information and are not uniform. *See Notice* at ¶¶ 13, 17. NAB points out that stations' issues/programs lists should not be uniform, and should contain a wide variety of information, reflective of the diversity of issues identified by broadcasters and the programming aired in response to those issues in different markets across the country.[23] Because "diverse programming is desirable," *Radio Deregulation Order* at 1088, stations' issues/programs lists should reflect that diversity and must therefore be expected to contain an "assortment" of information. Thus, this allegation appears to be a weak reed

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Class A television stations, approximately 11,600 cable systems serving 65 million television households, as well as other multichannel video providers (such as Direct Broadcast Satellite) that serve millions of subscribers. *See* FCC News Release, "Broadcast Station Totals as of September 30, 2000" (rel. Dec. 1, 2000). As the Commission and the courts have recognized, audiences benefit from the increasing diversity of programs offered by these outlets across the market. *See, e.g., United Church of Christ*, 707 F.2d at 1434; *Television Deregulation Order* at 1086-88; *Radio Deregulation Order* at 978-79, 988-89. Thus, to the extent that the adoption of a number of FCC-favored program categories is intended to impel broadcasters to be "all things to all people" by offering programming in every category devised, then such an effort is unnecessary and misguided. *See Lutheran Church*, 141 F.3d at 355-56 (while it is "understandable why the Commission would seek station to station differences, . . . its purported goal of making a single station all things to all people makes no sense" and "clashes with the reality" of the market).

[22] *See, e.g.*, Belo, *Non-Entertainment Programming Study* (2000) (Appendix A, Comments of Belo in MM Docket No. 99-360) (a review of a variety of television markets showed that major network affiliates in those markets currently dedicate one-third or more of their total broadcast hours to non-entertainment programming).

[23] *See Radio Deregulation Order* at 1088 (Commission stated that, if its regulations operated to produce programming addressing the "identical issues" by "all stations in a community," that would be a "strong reason to jettison" the rules).

indeed upon which to justify the adoption of a standardized form with constitutionally suspect program categories that may operate to increase the homogenization of television programming.

2. The Adoption of a Standardized Form Raises Other Practical Problems and Concerns.

The Commission may also have underestimated the practical difficulties with creating a standardized disclosure form and defining program categories. The Commission has offered no sample form of its own for comment, and the *Notice* referenced only the form and program categories suggested by the Advisory Committee. As Commissioner Powell specifically noted in his separate statement, the Advisory Committee's program categories "are unclear or duplicative," and, for example, he inquired "what distinguishe[d] 'public affairs programming' from 'programming that contributes to political discourse.'" The Commission merely dismissed these problems with the statement that it expected "the scope of defined categories would be commonly understood." *Notice* at ¶ 18. Given the Commission's previous difficulties in "minting clear definitional parameters to 'educational, instructional or cultural' programming" in the context of noncommercial educational television stations, the Commission's expectations are unconvincing.[24]

NAB also cautions that any new standardized form cannot be used as an indirect means to impose additional substantive programming obligations on broadcasters. For example, the Advisory Committee's form referenced in the *Notice* asks (*see* question six) whether the licensee has provided at least five minutes per day at no charge for candidate-centered discourse in the 30 days before a general election. Television broadcasters are, however, under no statutory or

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[24] *Order on Reconsideration*, File Nos. BALET-970602IA and BALCT-970530IA, FCC 00-25 at 2 (rel. Jan. 28, 2000) (Commission vacated its guidance previously adopted with regard to clarifying what constituted "educational, instructional or cultural" programming for noncommercial educational television stations).

regulatory obligation to provide any free time in any format for federal, state or local candidates.[25] Thus, such a question should not be included on any standardized form that might be adopted by the Commission as a "back door" method of pressuring broadcasters into complying with substantive programming requirements that have not been implemented through proper notice and comment procedures.[26]

Beyond asking about the programming shown in certain categories, the Commission also proposed that its new standardized form inquire about the community service activities of broadcasters. *See Notice* at ¶ 25. Although broadcasters are justly proud of their community service efforts,[27] NAB notes that the Commission appears confused as to the purpose of its proposal to require the quarterly reporting of these wide-ranging service activities. *See* Separate Statement of Commissioner Powell (seriously questioning how the Commission "would possibly make use of this information" and noting the "subjective" nature of any comparison between different kinds of community activities). In response to Commissioner Powell's question as to "what end" this requirement would serve, NAB would answer that there appears to be no end

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[25] Indeed, NAB has strongly contended that the Commission lacks statutory authority to adopt any such free air time requirement and that a free time requirement would violate the First Amendment. *See* Comments of NAB in MM Docket No. 99-360 (filed March 27, 2000).

[26] Also, if any new standardized form were to be adopted, NAB agrees that the form need not be filed with the Commission. *See Notice* at ¶ 33. As this proposed form would be designed to replace the current issues/programs list which is *not* filed with the Commission, NAB sees little reason to file the new form with the Commission, especially in light of the proposal for licensees to place the standardized form in their public inspection files each quarter.

[27] Over a 12-month period in 1998-99, local radio and television stations contributed $8.1 billion in community service nationwide. *See Local Broadcasters, Bringing Community Service Home: A National Report on Local Broadcasters' Community Service* at 3 (April 2000). This figure included the value of air time that broadcasters contributed for public service announcements, as well as the funds stations raised for charities, charitable causes, needy individuals and disaster relief activities. This report was not exhaustive, however, and did not attempt to cover every type of community-related activity engaged in by broadcasters and their employees.

beyond the collecting and reporting of the information. Indeed, as described in Section I. above, NAB objects to the Commission's approach in this proceeding precisely because it treats information collection and reporting as independently significant goals that need not directly serve any other relevant regulatory purpose. The proposal to gather and report information about the innumerable and divergent community activities of broadcasters clearly illustrates this fundamental problem with the Commission's approach.[28]

C. The Commission Has No Basis for Resurrecting Any Ascertainment Requirements for Inclusion on the Proposed Standardized Form.

In the 1980's, the Commission eliminated its ascertainment requirements for both television and radio broadcasters. Given the lack of evidence that ascertainment ever did in the past, or would in the future, lead to the provision of more responsive programming, NAB opposes the proposal to require broadcasters to provide a narrative description on the new standardized form of the actions taken to ascertain their communities' programming needs and interests.

The Commission has repeatedly emphasized that ascertainment was "never intended to be an end in and of" itself. *Television Deregulation Order* at 1098; *Radio Deregulation Order* at

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[28] The Commission is even unable to articulate a clear purpose for its proposal to require broadcasters to provide information on their provision of closed captioning and video description. The *Notice* contained no hint that broadcasters are failing to provide closed captioning as required under Commission rules, so this further information would not appear to serve a needed enforcement purpose. Although the *Notice* (at ¶ 20) stated that "consumers who rely on captions" have become "frustrated with the lack of information about which programs" are captioned, the Commission's reporting proposal would not directly address this problem. Requiring a broadcaster to report each quarter which, or how many, programs it broadcast with captioning *last* quarter would not materially aid consumers in determining whether a specific program to be aired tomorrow or next week will contain captions. Further, since almost every nationally distributed new television program is captioned (and indeed was so prior to any Commission captioning rules), detailed lists of programs that are captioned regularly would not appear to serve any consumer or regulatory purpose.

993. Rather, ascertainment was only a "means" of insuring that licensees "discovered" the "needs and issues facing their communities, *thereby positively influencing the programming performance of stations*." *Television Deregulation Order* at 1098 (emphasis added).[29] The Commission, however, concluded in 1984 that it had "*no* evidence that these procedures have had" any such positive "effect" on programming. *Id.* (emphasis added). Given this complete lack of evidence that the Commission's previous ascertainment requirements ever promoted the provision of more responsive programming, the Commission today has no basis upon which to reinstate a similar ascertainment obligation.[30] Certainly the *Notice* sets forth no reasons (let alone any convincing reason) to explain why the proposed ascertainment requirement would be effective when the Commission's earlier ascertainment rules were evidently so ineffectual.

The Commission has also presented no evidence showing that the elimination of ascertainment in 1984 has caused television broadcasters to become generally unresponsive to their communities, or has resulted in programming any less responsive than that provided prior to the elimination. The adoption of a new ascertainment requirement would therefore be unnecessary at best, capricious at worst. As the D.C. Circuit Court of Appeals has noted on several occasions, a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[31] Given this lack of

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[29] *See also Radio Deregulation Order* at 993 (ascertainment was "merely a tool to be used as an aid in the provision" of responsive programming).

[30] *See Bechtel*, 10 F.3d at 880 (a Commission policy was found arbitrary and capricious because the Commission had "no evidence to indicate" that the policy achieved "even one of the benefits attribute[d] to it").

[31] *City of Chicago, Illinois v. Federal Power Commission*, 458 F.2d 731, 742 (D.C. Cir. 1971); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *ALLTEL Corp.*, 838 F.2d at 561. The *Notice* (at ¶ 24) did identify a single commenter who had asserted that broadcasters "ignore certain communities." No empirical evidence was cited in the *Notice* to support this assertion.

connection between any ascertainment requirement and the provision of programming in the marketplace, the Commission's proposal would seem to have little purpose beyond the mere collecting and reporting of the information. As discussed in Section I. above, NAB does not believe that information gathering and reporting constitute independently significant regulatory goals.

Moreover, given the increased number of television stations and networks since the 1980's, the marketplace is currently providing a greater variety of programming than ever before. Certainly the video programming marketplace has never been more competitive, and "market forces, resulting from [this] increased competition, will . . . require licensees to be aware of the needs of their communities." *Television Deregulation Order* at 1099. Because it is in the "economic best interest" of any licensee "to stay informed about the needs and interests of its community," *id.* at 1101, the proposed ascertainment requirements are redundant and unneeded. Indeed, the available evidence demonstrates that broadcasters already consult with local community leaders and local businesses in deciding which issues and causes to address and in conducting their community service campaigns.[32]

Especially in light of this agency's previous determination that formal ascertainment requirements did not demonstrably influence programming in a positive way, NAB is accordingly skeptical that the new ascertainment proposal will result in programming more

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But even if this claim had some basis, this would not mean that a new ascertainment requirement should be adopted in the absence of evidence showing that the adoption of the proposed requirement would in fact solve the alleged problem. And as described in detail above, the Commission has never been able to find *any* evidence showing that ascertainment "positively influenc[ed] the programming performance of stations." *Television Deregulation Order* at 1098.

[32] *See* NAB, *Broadcasters, Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service* at 3, 8 (April 1998).

responsive than that already produced by a highly competitive market.[33] For all these reasons, the Commission should refrain from resurrecting in another form its previously-discarded ascertainment requirements.[34]

III. The Commission Has Underestimated The Costs And Burdens, And Overestimated The Public Benefits, Associated With Its Undefined Proposal For Posting Public Files On The Internet.

The *Notice* proposed to require television licensees to make the contents of their public inspection files (including the new standardized form) available on their stations' or a state broadcasters association's Internet website. Although the Commission admitted that it did not have "any specific information" about "the costs and benefits" of such a requirement (*Notice* at ¶ 28), the Commission nonetheless stated that it believed "that converting the public inspection file into an electronic format and placing it . . . on a website will not be unduly burdensome." *Id.* at ¶ 30. Based on our own research and the work of an independent consultant, NAB concludes that the Commission's proposal would entail significant burdens, particularly on stations that do not currently have websites and on stations with limited personnel resources. Moreover, as

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[33] *See Bechtel*, 10 F.3d at 881 (court opined that "skepticism is appropriate when agencies are trying to accomplish something that is essential to the survival and prosperity of firms in an ordinary market – such as ensuring that a business identifies and fills available market niches, [and] is responsive to its customers"). Because it is "essential" for broadcasters to identify and fill "available market niches" and to be "responsive" to their customers, NAB doubts that the inclusion of an ascertainment requirement on a new standardized form will produce programming demonstrably more diverse, varied or responsive.

[34] Admittedly, the ascertainment proposal in the *Notice* is less formal and elaborate than the Commission's earlier requirements. But the Commission in 1984 – beyond eliminating its detailed ascertainment requirements – also declined to adopt a more limited ascertainment obligation similar to the one proposed in this *Notice*. *See Television Deregulation Order* at 1098 (Commission specifically rejected the option of adopting a more circumscribed ascertainment obligation that would allow licensees to use any "reasonable" method in determining their communities' needs and interests). In light of its earlier rejection of a less formal and detailed ascertainment requirement, NAB sees no basis for the Commission to change course and adopt such a requirement now. *See State Farm*, 463 U.S. at 42.

discussed below, the costs and burdens imposed on broadcasters could increase greatly depending on whether the Commission requires websites with public files to possess specific "user friendly" features or technical capabilities. Given the substantial costs, practical difficulties, and technical uncertainties of the proposal, as well as its relatively limited benefits, NAB urges the Commission to refrain from adopting its proposal.[35]

A. The Costs and Burdens of Placing Stations' Public Files on a Website Appear Substantial, Especially if the Commission Were to Require Internet Public Files to Include Particular Technical Features and Capabilities.

To attempt to quantify the costs and burdens of placing public files on the Internet, NAB surveyed the size of a number of television stations' public files, conducted a survey pertaining to stations' websites, and requested an outside consultant to estimate the various costs entailed in creating and maintaining websites and converting large numbers of documents to electronic format. Based on this research, NAB believes that the costs and burdens associated with the Commission's proposal would be substantial, although it is difficult to estimate precisely given the lack of technical specificity in the *Notice*.

Our survey pertaining to station websites shows that, while the majority (83.9%) of television stations responding presently has a website, some stations still do not. *See* Attachment A at 1. Those stations located in top 50 markets that do not currently have websites are either independent or are affiliated with emerging networks, while stations in smaller markets that lack websites are a mix of independent and emerging and major network affiliates. Only about one

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[35] *See, e.g., State Farm*, 463 U.S. at 54 (agency needs "to look at the costs as well as the benefits" of a regulatory standard); *People of the State of California v. FCC*, 905 F.2d 1217, 1231 (9th Cir. 1990) (reviewing court "must be satisfied that the Commission's assessment of the various costs and benefits is reasonable in light of the administrative record," and "if the FCC's evaluation of any significant element in the cost/benefit analysis lacks record support," then the court "cannot uphold the agency action" under the Administrative Procedure Act).

quarter (26.1%) of stations with websites actually host, develop and/or maintain their sites. *Id.* Rather than performing these various tasks themselves, most stations contract out the hosting, development and maintenance to an applications service provider or an Internet Service Provider. In addition, responding stations with websites indicated that they have limited personnel dedicated to the creation and maintenance of those sites. On average, these stations have 1.1 full-time equivalent personnel dedicated to website issues. *Id.* And of those stations with websites over one-fifth reported that they have *no* personnel dedicated to working on their websites.

In addition to conducting this survey, NAB obtained measurements of the size of the public files of the commercial television stations located in one large market.[36] The public files of these stations contained, on average, about 71½ inches – or approximately six feet – of paper. NAB accordingly estimates that those stations' public files contain approximately 14,000 pages of paper that would have to be converted into electronic format for posting on a website under the Commission's proposal.[37]

Based on the above-described research, NAB has attempted to estimate the costs and other burdens associated with converting stations' public files into electronic format and with creating (or upgrading) stations' websites and maintaining the Internet public file. It seems clear that these costs and burdens would not be negligible. Considerable expense and personnel time would be involved in scanning thousands and thousands of pages and posting them on the

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[36] These included stations owned and operated by major networks, major network affiliates owned by other groups, and emerging network affiliates.

[37] A ream of paper (500 sheets) measures only two inches. Thus, 72 inches of paper would be approximately 18,000 sheets (500 x 36). We then reduced this figure by 20-25%, as papers in a public file may be less tightly packed than in a ream of packaged paper. Accordingly, NAB estimates that a station's public file contains about 14,000 pages of paper.

Internet, particularly if the station does not currently have a website or would need to upgrade its website and server to handle the additional volume of information. Certainly these costs would fall most heavily on smaller, unaffiliated stations that may likely be less profitable (and which are the very types of stations that tend to lack websites).

Stations with limited personnel would also find the Commission's proposed requirement to be quite burdensome. As explained above, stations with websites have on average about one full time equivalent person dedicated to the creation and maintenance of their websites, and over one fifth of the stations with websites have no such dedicated personnel. It is therefore likely that a number of stations would need to hire an additional (or their first) employee to deal with website issues if stations are required to place their public files on the Internet. Not only would stations need personnel to deal with the major initial task of converting their public files, but they would also need personnel to maintain their Internet public files by posting new and deleting out-of-date information.[38] For these reasons, NAB submits that the Commission's proposal would impose significant burdens on television broadcasters, although, as explained in detail below, quantifying those burdens precisely remains problematic.

Even with a report provided by an outside consultant as to the costs associated with the Commission's proposal (*see* Attachment B), we find it difficult to provide concrete estimates due to the undefined nature of the Commission's proposal. The *Notice* merely proposed to require television licensees to make the contents of their public inspection files available on an Internet website. The Commission did not discuss any of the technical questions raised by its proposal, nor address the extent to which Internet sites with public files should possess specific "user

[38] This updating task would be particularly burdensome in an election season, during which the "political file" portion of the Internet public file would need to be updated almost daily. *See* Section III.C. below.